Supreme Court, U. S.
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In the Supreme Court of the United States

October Term, 1978

NO. 78-465

FRANK D. NAPOLITANO and
NORMA NAPOLITANO, Appellants,

vs.

WYOMING STATE HIGHWAY DEPARTMENT
AND STATE HIGHWAY COMMISSION,
Appellees

ON APPEAL FROM THE SUPREME COURT OF WYOMING

JURISDICTIONAL STATEMENT

GEO. A. BANGS

Bangs, McCullen, Butler, Foye & Simmons
818 St. Joseph Street; P. O. Box 2670
Rapid City, South Dakota 57709
Attorneys for Appellants

EDWARD S. HALSEY

P. O. Box 427
Newcastle, Wyoming 82701
Attorney for Appellants

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In the Supreme Court of the United States

October Term, 1978

NO. ———

FRANK D. NAPOLITANO and
NORMA NAPOLITANO, Appellants,

vs.

WYOMING STATE HIGHWAY DEPARTMENT
AND STATE HIGHWAY COMMISSION,
Appellees

ON APPEAL FROM THE SUPREME COURT OF WYOMING

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of the State of Wyoming entered July 11, 1978, reversing the judgment of the District Court of Weston County, Wyoming and instructing the entry of summary judgment against these appellants. This statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of the State of Wyoming is reported in 578 Pac.2d 1342. Copy of

the Opinion of the Supreme Court of the State of Wyoming, copy of Petition for Rehearing, copy of the Order of the Supreme Court of Wyoming denying Petition for Rehearing, and copy of Mandate are attached hereto as Appendix "A".

JURISDICTION

This suit was brought by the appellants against the Wyoming State Highway Department and State Highway Commission in the District Court of Weston County, sixth judicial district of Wyoming. Judgment was there entered awarding to the plaintiffs, damages of eighty seven thousand five hundred dollars ($87,500) as just compensation for certain property rights taken from them by the defendants. The defendants then appealed to the Supreme Court of the State of Wyoming which reversed the Trial Court by Opinion dated May 4, 1978. Petition for Rehearing was denied by Order dated June 20, 1978. Mandate to the Trial Court to enter judgment in favor of Wyoming State Highway Department and State Highway Commission was entered July 11, 1978.

Notice of Appeal was filed with the Clerk of the Supreme Court of Wyoming on Aug. 30, 1978, and with the Clerk of the District Court of Weston County, Wyoming on Aug. 30, 1978.

The jurisdiction of the United States Supreme Court to review this decision by direct appeal is conferred by title 28, U. S. Code, Sec. 1257 (2).

QUESTION PRESENTED

May a state legislature, by requiring filing of a written claim within a limited period of time as a condition precedent to suit against the state, thereby abridge or destroy the rights of these plaintiffs to obtain just compensation for property rights taken from

them by state authorities, in violation of their rights under the Fifth and Fourteenth Amendments to the United States Constitution?

STATUTES INVOLVED

Section 9-2-332, Wyoming Statutes 1977, provides as follows:

> "Persons having claims against the state shall exhibit the same, with the evidence in support thereof, to the auditor, to be audited, settled and allowed, within one year after such claim shall accrue, and not afterward."

STATEMENT OF THE CASE

The Trial Court entered Findings of Fact and Conclusions of Law, none of which were disturbed by the Wyoming Supreme Court on review as follows:

I

Plaintiffs are now, and at all material times were, the owners of certain lands in Sections 21 and 28, Township 46 North, Range 61 West, Weston County, Wyoming, known as the Flying V Ranch.

II

In July and August, 1972, the defendants, in connection with Project F-025-5 (5), negotiated with plaintiffs and procured from them a deed to a portion of such land to be utilized for relocation and reconstruction of a highway, known as the Newcastle-Four Corners road, identified as U. S. 85.

III

In the course of such negotiations, the authorized representatives of the defendants represented to the plaintiffs that the elevation of the new highway as it approached from the South would be no higher than

the top of a certain pine tree; that the highway when constructed would be such that the lights of oncoming cars from the South would shine on the buildings of the Flying V and that the elevation of the highway as it passed the buildings of the Flying V would be at the level of the foundation of a certain cabin referred to as the "big Cabin".

IV

The plaintiffs placed justifiable reliance upon such representations, and in reliance thereon executed on August 17, 1972, a contract, defendants' Exhibit 1, whereby plaintiffs agreed to convey certain property to the defendants for highway purposes at an agreed consideration, which consideration was paid and conveyance made. This agreement further provided that the consideration so paid should constitute full compensation for all of the plaintiffs' landowners' interest and damages.

V

As actually constructed, the highway rises to as much as twenty feet above the elevation as represented, with the result that plaintiffs' buildings are obscured from view of approaching motorists. Plaintiffs' property has thereby been taken or damaged for public use without just compensation contrary to the provisions of the Constitutions of Wyoming and of the United States of America.

VI

Plaintiffs operate the Flying V - Cambria Inn within the buildings at the Flying V Ranch and depend upon the restaurant bar and lounge, and guest rental units to produce income for their livelihood and for the payment of their investment in the Flying V Ranch.

VII

During October of 1974, the newly constructed high-

way called Project F-025-5 (5) was finally approved. It was accepted by the Wyoming Highway Department on November 22, 1974.

VIII

As a result of the increased elevation of the highway, the southerly approach access to plaintiffs' property from the highway is so steep and dangerous as to require closing of plaintiffs' business establishment during the winter months thereby lessening the fair market value of such property.

IX

As a result of the increased elevation of the highway, occupants of vehicles approaching the Flying V - Cambria Inn from both the south and north are unable to view the buildings in which the Plaintiffs operate their business. The number of transient patrons and former patrons of the plaintiffs' business has substantially declined.

X

On or about December 29, 1975, the plaintiffs filed with the State Auditor of the State of Wyoming a verified claim asserting plaintiffs' damages to be in the sum of One Hundred Fifty Thousand Dollars ($150,000).

XI

The court concludes that the signatures of the plaintiffs on defendants' Exhibit 1 were secured by representations concerning material facts which were untrue and upon which plaintiffs placed justifiable reliance. Accordingly the agreement should be and is hereby set aside insofar as it purports to establish the consideration paid as a complete and full satisfaction and discharge of plaintiffs' loss and damage from the acquisition of property and construction of the highway.

XII

The court finds and concludes that the remaining property owned by these plaintiffs has been diminished in value by the acquisition of right of way and construction of the highway in its present location in the total additional amount of eighty seven thousand five hundred dollars ($87,500). In reaching this conclusion as to damages, the court has found that the testimony of the expert witness presented by the defendants to the effect that the entire property has a minus value at the time of the taking should not be considered by the court in the determination of damages.

XIII

The court finds that plaintiffs have expended one hundred and sixty five dollars ($165) on engineering costs; that a reasonable fee for plaintiffs' expert appraiser is one thousand five hundred dollars ($1,500) and that reasonable attorneys' fees for plaintiffs' counsel is seven thousand five hundred dollars ($7,500) if allowable. However, the court finds and concludes that the statute under which plaintiffs' claim allowance for such fees and expenses is ambiguous to such an extent that the court has no authority to award such expenses as part of the judgment herein.

XIV

The court concludes that no pre-judgment interest should be allowed.

XV

Plaintiff should be awarded ordinary costs of this action. (Record on Appeal, pages 96-100)

* * * * *

Without disturbing any of the findings of the Trial Court, the Supreme Court of Wyoming concluded

that the cause of action accrued on October 16, 1974 when traffic was first routed over the new highway, and that the failure of the plaintiffs to file a written claim with the State Auditor within one year after that date as required by Wyoming Statutes 9-2-332 prevents any recovery by the plaintiffs.

Federal question raised by this appeal was first raised below by Petition for Rehearing addressed to the Supreme Court of Wyoming. The Opinion of that Court, entered on May 4, 1978, established for the first time that under the law of Wyoming, plaintiffs' cause of action was barred by Wyoming Statutes 9-2-332. The appellants (plaintiffs below) filed a timely Petition for Rehearing on June 5, 1978, raising the single contention that the Wyoming Claim Filing Statute, Wyoming Statutes 9-2-332, cannot as a matter of Federal Constitutional Law, bar a right of action arising under the Federal Constitution. On June 20, 1978, such Petition for Rehearing was denied by order of the Wyoming Supreme Court, which Order recited:

> "having considered the Petition, as well as the Opinion handed down herein on May 4, 1978, we find that all points raised in the Petition were carefully and fully considered by the Court in the disposition heretofore made."

It is, therefore, ultimately clear that the Wyoming Supreme Court has considered the Federal Question raised and has squarely decided same against the appellants.

THE QUESTIONS ARE SUBSTANTIAL

The basic question of *federal* constitutional law hereby raised is this:

May a state legislature, by requiring filing of a written claim within a limited period of time as a condition precedent to suit against the state, thereby abridge or destroy the right of these plaintiffs to ob-

tain just compensation for property rights taken from them by state authorities, in violation of plaintiffs' rights under the Fifth and Fourteenth Amendments?

We submit that the answer to that question must be in the negative.

The Fifth Amendment to the United States Constitution states that private property shall not be taken for a public use without the payment of just compensation. A suit for inverse condemnation is an action to vindicate the right created and guaranteed by the Fifth Amendment, and applicable to the states by way of the Fourteenth Amendment. It therefore follows that a state statute which abridges the right of a property owner to sue in inverse condemnation to vindicate his federally created constitutional right to just compensation, is facially unconstitutional.

The jurisdiction of the Supreme Court of the United States is properly invoked by appeal under 28 U.S.C. 1257 (2) where the state court judgment sought to be reviewed upholds a state statute against the contention that on its face and as applied the statute violates the Federal Constitution. *Bantam Books v. Sullivan,* (1963) 372 U.S. 58, 9 L.Ed.2d 584, 83 S.Ct. 631.

In states such as Texas, Montana, Nebraska, Washington, and Arizona, the question does not arise because, as a matter of state constitutional law, it is held that claim filing requirements do not apply to inverse condemnation suits. (1)

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1. **City of Waco v. Roberto,** (Tex. 1932), 48 S.W.2d 577; **Renault Inc. v. City of Houston,** (Tex. Civ. App. 1967, 415 S.W. 2d 948; **Alexander v. State,** (Mont. 1963), 381 P.2d 780; **Armbuster v. Stanton-Pilger Drainage Dist.,** (Nebr. 1957), 86 N.W. 2d 56; **Decker v. State,** (Wash. 1936), 62 P.2d, 35, **Docstader v. City of Centralia,** (Wash. 1940), 100 P.2d 377; **Knapp Brick & Tile Co. v. Skagit County,** (Wash. 1940), 102 P.2d 679; **State v. Leeson,** (Ariz. 1958), 323 P.2d 692; and **State v. Hollis,** (Ariz. App. 1970), 469 P. 2d 855.

The Wyoming Court, however, has chosen to follow California by holding contrary to the majority rule, that a limited claim filing statute will serve to bar an action sounding in inverse condemnation.

In *Willis v. Reddin,* (9th Cir. 1969), 418 F.2d 702, the Court of Appeals had occasion to examine a closely related question. Following the abolition of the ancient doctrine of sovereign immunity, by decision of the Supreme Court of California, that State enacted a Tort Claims Act, thus legislatively permitting suit against the sovereign state for personal injuries inflicted by its employees and agents under certain circumstances. The statute required the filing of a written claim within 100 days and commencement of suit within a short time thereafter. The plaintiff in *Willis v. Reddin* had a cause of action cognizable under the California Tort Claims Act, but also cognizable under the Federal Civil Rights Law, and he brought suit under the federal statute. There being no statute of limitations expressed under the federal statute, the District Court dismissed the case on the basis that the notice and time requirements of the California Tort Claims Act were applicable. The Court of Appeals reversed upon the basis that a state law requiring notice of claim could not abridge a ***federally*** created right of action.

The decision is precisely parallel to the case at bar. By Section 9-2-332, W.S., the Wyoming Legislature has created a condition precedent to its waiver of sovereign immunity and seeks to bar all claims where there is non-compliance with that statute. Wyoming may, and under the decision of its Supreme Court, Wyoming ultimately does have the right and power so to condition the bringing of an action under its constitution and statutes. However, where, as in the instance case, the claim of the plaintiffs is that they were deprived of property without just compensation under circumstances which deprive them of rights guaranteed by the United States Constitution,

the Wyoming Legislature has no power to abridge or destroy such federally created rights.

The Trial Court found in this case that:

> "Plaintiff's property has thereby been taken or damaged for public use without just compensation contrary to the provisions of the Constitutions of Wyoming and of the United States of America." (Court's Finding No. V)

Our position is well stated and squarely supported by the decision of the Supreme Court of Nevada in *Apler v. Clark County,* (Nev. November 17, 1977) 571 P.2d 810. (Cert. denied 46 L.Wk. 3706).

This case is squarely in point and holds:

> "Claims statutes, which required persons to give county notice of claim or demand within six months from time claim or account became due and payable and required compliance with it which, in case of inverse condemnation, would allow the state to impose a precondition to sue on a federally created and protected right, did not apply to action for inverse condemnation, since to do so would have denied property owners due process of their constitutional right to just compensation for private property taken for public use."

We recognize the prestige of the California Supreme Court, but we question the persuasiveness of its holding in *City of San Jose v. Superior Court,* (9/6/74) 525 P. 2d 701, 76 A.L.R.3d 1223. That Court did not discuss and apparently overlooked the *federal* constitutional implications of its assertion that the California claims filing statute was applicable to inverse condemnation. It may be that the Court was too occupied with the class action question, which was the principal point of the case, to devote attention to the serious federal question.

In any event, a subsequent case, decided by the Supreme Court of California en banc on May 4, 1976, casts an ominous shadow over the doctrine of the San Jose case. *Williams v. Horvath,* (Calif. 1976) 129 Cal. Rep. 453, 548 P.2d 1125. The plaintiff in *Williams v. Horvath* had a cause of action under the California Tort Claims Act, but elected to bring his case in state court under the Federal Civil Rights Law. Plaintiff did not file claim within 100 days after the accrual of the cause of action as commanded by the California Tort Claims Act. The California Court held for the plaintiff on the basis that the California claims statute could not constitutionally abridge a right created by federal law. In doing so, the Court quoted at length, with apparent approval, the decision of the 9th Circuit in *Willis v. Reddin,* as follows:

> "In California, statutes or ordinances which condition the right to sue the sovereign upon timely filing of claims and actions are more than procedural requirements. They are elements of the plaintiff's cause of action. When the action is against the public employee rather than the public entity such statutes are given the same effect. While it may be completely appropriate for California to condition rights which grow out of local law and which are related to waivers of the sovereign immunity of the state and its public entities, California may not impair federally created rights or impose conditions upon them. Were the requirements of the Tort Claims Act nothing more than procedural limitations we would in fashioning the remedial details applicable to the federally created right involved here, determine whether the California courts would apply the requirements of the California Tort Claims Act. However, since the requirements of that Act, under the interpretations of the California courts, condition the right, we think it would be singularly inappropriate to fashion a federal procedural detail by any reference to it."

Thus, the California Court has recognized that a

state claim filing statute of limited duration may bar a claim under state law, but it cannot bar a federally created right of action.

The U. S. District Court for the Eastern District of California in an unpublished opinion and order entered August 11, 1975, has held squarely that the California claims statute cannot bar an action in inverse condemnation as a matter of federal constitutional law. That court states:

> "In the instant case, it is apparent that Section 911.2 is a condition on the right to sue on an inverse condemnation claim. *Mosesian v. County of Fresno, supra; Bellman v. County of Contra Costa, supra.* The Fifth Amendment to the United States Constitution states that private property shall not be taken for a public use without the payment of just compensation. A suit for inverse condemnation is an action to vindicate the right created and guaranteed by the Fifth Amendment, and applicable to the states by way of the Fourteenth Amendment. To impose a requirement of compliance with California Government Code Section 911.2 in the case at bar would allow a state to impose a pre-condition to suit on a federally created and protected right. The imposition of such a pre-requisite to suit is an impairment of a federal right not countenanced by *Willis.*"
>
> (*The Albert Ellis Radinsky Foundation, Inc. v. County of Sierra,* Civ. No. 8100, unpublished pp. 6 and 7.)

In apparent recognition of the constitutional infirmity, the California legislature has now made Section 911.2 which formerly imposed claims filing limitations, inapplicable to actions in inverse condemnation. California Statutes 1976, Chapter 96, Section 1 provides:

> "No claim is required to be filed to maintain an action against a public entity for making of, or damage to, private property pursuant to Section 19 of Article 1 of the California Constitution."

This section is now codified as Government Code 905.1.

There can be no question but that an individual whose property is taken without just compensation, has a right of action under the United States Constitution against the public body which accomplishes the taking. In the landmark case declaring the just compensation clause of the Fifth Amendment to be applicable to the several States via the Fourteenth Amendment, this Court said:

> "In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is upon principle and authority, wanting in the due process of law required by the 14th Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument." *Chicago, B & Q RR Co. v. City of Chicago,* (1897) 166 U.S. 226 at 241, 41 L.Ed. 979 at 986.

In the more recent case of *Mosher v. City of Phoenix,* (1932) 287 U.S. 29, 77 L.Ed. 148, 53 S. Ct. 67, Chief Justice Hughes declared:

> "We are of the opinion that the allegations of the bills of complaint that the city, acting under color of state authority was violating the asserted private right secured by the Federal Constitution presented a substantial federal question and that it was error of the district court to refuse jurisdiction." 77 L.Ed. at 150.

The Mosher case was followed by Sixth Circuit in *Foster v. Herley* (6th Cir. 1964) 330 F.2d 87. In that

case the U. S. District Court in Michigan had dismissed for lack of jurisdiction a complaint against the City of Detroit in the nature of inverse condemnation. Reversing the District Court, the Sixth Circuit said:

> "We are of the opinion that the amended complaint in the present case complies with these requirements. The plaintiff claims a right under the Fourteenth Amendment to the United States Constitution not to be deprived of his property without due process of law and that the acts of the defendant constituted such a deprivation. If the Fourteenth Amendment is so construed, it supports his claim. If it is not so construed, his claim is defeated. The District Court had jurisdiction under Section 1331, Title 28 United States Code, to decide this question."

Pursuant to this mandate, the District Court did entertain a very substantial class action relating to the urban renewal activities of the City of Detroit. *Foster v. City of Detroit,* (S.D. Mich. 1966) 254 F. Supp. 655. The Trial Court there found that the actions of the city in destroying the value of plaintiff's property by various actions relating to urban renewal constituted a federal constitutional taking for which the city must make just compensation.

There is a rising tide of litigation in which the claim is made that restrictive land use controls constitute a "taking" of private property within the meaning of the Fifth Amendment. Much of this litigation finds its way to the Federal Court because of the fact that a federal question is thus presented for adjudication. (2)

If the holding below were allowed to stand, it would be possible for State Legislatures to vitiate the rights of property owners under the Fifth and Fourteenth

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2. See generally, Harris, "Application of the Abstention Doctrine to Inverse Condemnation Actions in Federal Court." 4 Pepperdine Law Review 1, (1976).

Amendments by requiring the filing of claims within a short time period as a condition precedent to any inverse condemnation suit against a governmental agency or subdivision.

This Court indicated quite clearly that a deprivation of access to a highway without just compensation, if accomplished under sanction of state law, gives rise to a serious constitutional issue under the Fifth and Fourteenth Amendments. *Martin v. Creasy,* (1959) 360 U.S. 219, 3 L.Ed. 2d 1186, 79 S.Ct. 1034, separate concurring opinion of Justice Brennan, 360 U.S. at 226, 3 L.Ed.2d. at 1191.

The principal opinion of the Court in *Martin v. Creasy,* concludes as follows:

> "If after all is said and done in the Pennsylvania Courts, any of the plaintiffs believe that the commonwealth has deprived them of their property without due process of law, this Court will be here." 360 U.S. at 225, L.Ed.2d at 1190.

The Wyoming Court has recognized in this case that the consequential damages suffered by these plaintiffs are compensable, but recovery is denied *solely* because of failure to comply with the statutory (not constitutional) requirement that verified claim be filed *within one year after accrual of the claim.* While such filing may be required by Wyoming law as a precondition to enforcement of rights arising under state law, such filing may not be required as a precondition to the enforcement of rights arising under the United States Constitution. Thus, under the precise holding and reasoning of the California Court in *Williams v. Horvath, supra,* of the Ninth Circuit in *Willis v. Reddin,* and of the Nevada Court in *Apler v. Clark County,* the judgment of the Wyoming Supreme Court should be reversed and the judgment of the Trial Court reinstated.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully Submitted

September, 1978

In the Supreme Court of the United States

October Term, 1978

NO. ———

FRANK D. NAPOLITANO and
NORMAL NAPOLITANO, Appellants,

vs.

WYOMING STATE HIGHWAY DEPARTMENT
AND STATE HIGHWAY COMMISSION,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF WYOMING

APPENDIX

IN THE SUPREME COURT,
STATE OF WYOMING

APRIL TERM, A.D. 1978

MAY 4, 1978

WYOMING STATE HIGHWAY DEPARTMENT and STATE HIGHWAY COMMISSION, Appellants (Defendants below),	)	578 P. 24 1342
v.	)	No. 4727
FRANK D. NAPOLITANO and NORMA NAPOLITANO, Appellees (Plaintiffs below).	)	
FRANK D. NAPOLITANO and NORMA NAPOLITANO, Appellants (Plaintiffs below),	)	
v.	)	No. 4728
WYOMING STATE HIGHWAY DEPARTMENT and STATE HIGHWAY COMMISSION, Appellees (Defendants below).	)	

Appeals from the District Court of Weston County, the Honorable Paul T. Liamos, Jr., Judge.

V. Frank Mendicino, Attorney General, Glenn A Williams, Senior Assistant Attorney General, and Daniel E. White, Assistant Attorney General, Cheyenne, for

Wyoming State Highway Department and State Highway Commission.

Edward S. Halsey, Newcastle, Wyoming, and George A. Bangs, Rapid City, South Dakota, for Frank D. Napolitano and Norma Napolitano.

Before GUTHRIE, C. J., RAPER, THOMAS ano ROSE, J.J., and MAHONEY, D.J.

ROSE, Justice.

Two cases are here consolidated upon appeal, one of which is taken by the Wyoming State Highway Department and State Highway Commission, defendants-appellants, from a judgment entered in Weston County District Court, Sixth Judicial District. This judgment awards plaintiffs-appellees, the Napolitanos, damages of $87,500.00 plus costs of $12.00 and sets aside a written agreement insofar as it purports to be a complete settlement for consequential damages in the taking of Plaintiffs' land for a public purpose.

The second appeal is taken by the Plaintiffs from that portion of the judgment which denied them their attorney's fees, engineering fees, expert's appraisal fees, and pre-judgment interest.

Two cases are here consolidated upon appeal, one of which is taken by the Wyoming State Highway Department and State Highway Commission, defendants-appellants, from a judgment entered in Weston County District Court, Sixth Judicial District. This judgment awards plaintiffs-appellees, the Napolitanos, damages of $87,500.00 plus costs of $12.00 and sets aside a written agreement insofar as it purports to be a complete settlement for consequential damages in the taking of Plaintiffs' land for a public purpose.

The second appeal is taken by the Plaintiffs from that portion of the judgment which denied them their attorney's fees, engineering fees, expert's appraisal fees, and pre-judgment interest.

When issues were joined in the appeal first men-

tioned above, the Defendants filed a motion for summary judgment on the grounds that Plaintiffs had not complied with the provisions of § 9-2-332, W. S. 1977 (§ 9-71, W. S. 1957). This statute provides:

> "Persons having claims against the state shall exhibit the same, with the evidence in support thereof, to the auditor, to be audited, settled and allowed, within one (1) year after such claim shall accrue, and not afterward."

The trial court denied the motion for summary judgment, whereupon the parties went to trial on the issues, with the court holding generally for the Plaintiffs, except for their claim for fees. We will reverse the trial court's order overruling the Defendants' motion for summary judgment, will affirm its holding denying fees, and will not, therefore, reach the other issues.

FACTS

At all times pertinent to this litigation, Plaintiffs were owners of property in Weston County, Wyoming, known as the Flying V Ranch, where they operated the Flying V Cambria Inn, a guest facility with restaurant and lounge. In connection with a federally assisted project on United States Highway 85 which proceeds north out of Newcastle, Wyoming, to Lead, South Dakota, the Defendants, in July and August of 1972, negotiated with Plaintiffs for a deed to a parcel of their land. The purpose of the acquisition was to permit relocation of the then-existing U.S. Highway 85, the consequence of which would be to change the relative position of the highway with respect to the Flying V Cambria Inn. Plaintiffs charged in their complaint that, during the negotiations, the authorized agents of the Defendants represented to them that the elevation of the new highway, as it approached from the south, would be no higher than the top of a certain pine tree, that, when constructed, it would be such that the lights of oncoming

motor vehicles from the south would shine on the buildings of the Inn; and that the elevation of the relocated highway, as it passed the buildings, would be at the level of the foundation of a certain cabin referred to as the "big cabin." Plaintiffs' position is that, in reliance upon the representations thus made, the parties executed a Memorandum of Agreement on August 17, 1972. Under the agreement, Plaintiffs were to convey the land to Defendants for highway purposes for an acceptable and agreed-upon consideration. Accordingly, the consideration was paid and a deed was issued to the Defendants.

The Plaintiffs charge, and the trial court found, that, as actually constructed, the relocated highway rises to as much as twenty feet above the level which the Plaintiffs contend was represented by the Defendants to be the ultimate highway elevation. The result is that passing vehicles cannot see the buildings of the Inn, and Plaintiffs charge that this has resulted in a business loss. The court agreed. Other consequential damages are claimed by the Plaintiffs and found by the court, especially having to do with the steepness of the grade going into and away from the Inn.

Appellees-Plaintiffs define the summary judgment issue in the following way:

> "I
>
> "Article 1, Section 33 of the Wyoming Constitution is self-executing and Plaintiff (sic) has (sic) a right thereunder, irrespective of sovereign immunity and independent of any legislative enactment.
>
> "II
>
> "The filing of a statutory notice of claim against a governmental body is unnecessary where the proceedings are in the nature of inverse condem-

nation and are brought as a matter of constitutional right.

"III

"Under the circumstances here present, the State of Wyoming is estopped to claim that Plaintiffs' remedy is barred by the lapse of one years of taking."

The trial court heard the summary judgment motion on January 19, 1976, and ruled that

" . . . the highway project here involved was not officially closed and concluded as required by law until August, 1975. Accordingly, it appears to the Court that, if the statute requiring verified claim is applicable to this proceeding in inverse condemnation, it does not clearly appear as a matter of law that a year has elapsed since the accrual of such cause of action. Accordingly, it is by the Court:

"Ordered that Defendants' Motion for Summary Judgment be and the same is hereby denied.

"FURTHER ORDERED that the Plaintiffs may amend their Complaint on or before February 2, 1976, to allege the filing of a verified claim with the State Auditor."

The relevant "Findings of Fact and Conclusions of Law" made and found by the court on July 8, 1976, the day judgment was entered, are these:

"As a result of the increased elevation of the highway, the Southerly approach access to plaintiffs' property from the highway is so steep and dangerous as to require closing of plaintiffs' business establishment during the winter months thereby lessening the fair market value of such property."

"As a result of the increased elevation of the highway, occupants of vehicles approaching the

Flying V - Cambria Inn from both the South and the North are unable to view the buildings in which the plaintiffs operate their business. The number of transient patrons and former patrons of the plaintiffs' business has substantially declined."

"The court concludes that the signatures of the plaintiffs on Defendants' Exhibit 1 (the Memorandum of Agreement) were secured by representations concerning material facts which were untrue and upon which plaintiffs placed justifiable reliance. Accordingly the agreement should be and is hereby set aside insofar as it purports to establish the consideration paid as a complete and full satisfaction and discharge of plaintiffs' loss and damage from the acquisition of property and construction of the highway."

"The court finds and concludes that the remaining property owned by these plaintiffs has been diminished in value by the acquisition of right of way and construction of the highway in its present location in the total additional amount of Eighty-seven Thousand Five Hundred Dollars ($87,500.00) . . . . "

The pertinent and relevant dates having to do with the claim filing are:

In August of 1972, the Defendants obtained a right-of-way from the owners of the Flying V. In August, 1973, Plaintiffs complained to a foreman working for the construction company that the highway was being laid out at a location different from that represented by the right-of-way negotiator for the State Highway Department, and in the spring of 1974, Plaintiffs made a similar contact with a Highway Department Employee. Both men represented that they were building the road according to plans. On October 16, 1974,

the relocated highway was opened for traffic. 1/ Plaintiffs wrote Defendants on July 23, 1975, alleging misrepresentations at the time the agreement was entered into and threatened action for rescission to force a re-evaluation. This letter does not purport to be a formal claim. In August, 1975, notice of highway final acceptance by the Highway Commission was published. On September 18, 1975, the parties met to discuss the Plaintiffs' objections – on October 1, 1975, the Defendants wrote a letter denying Plaintiffs' demands, and on November 13, 1975, the Plaintiffs filed their complaint for damages, in response to which the Defendants filed their answer on December 3, 1975. On December 22, 1975, Defendants filed a motion for summary judgment, alleging failure to comply with § 9-2-332, supra, which motion was, on January 22, 1976, overruled, with the court granting the Plaintiffs authority to amend their complaint to allege the filing of a verified claim with the State Auditor. The amended complaint was filed on January 22, 1976, alleging that on or about December 29, 1975, Plaintiffs had filed a verified claim with the State Auditor for damages – a fact which is supported by the record.

THE ISSUES

Section 9-2-332, W. S. 1977, requires the filing of a claim where it is contended the contract has been breached by the State or its agents:

1/ While the final judgment of the district court refers to November 22, 1974, as the date when the project in question was finally accepted by the Highway Department, there is no evidence in the record to support such a finding. The only evidence on this point is a reference to November 22, 1972, when the final pre-construction plans were approved. Even if the November, 1974, date was supported by the evidence and was relevant for our purpose, it would have no effect on our holding that the Plaintiffs' claim was untimely — since the claim was still filed more than a year after this time.

Throughout the record and the briefs, the Wyoming State Highway Department and State Highway Commission have argued that as a condition precedent to bringing this action – whether it be in contract or inverse condemnation – it is required that a claim under § 9-2-332, supra, must first be filed. The Defendants go on to argue that since the claim was not timely filed, the court erred in overruling the motion for summary judgment. It is the position of the Napolitanos, on the other hand, that this is not an action upon the contract but is one in inverse condemnation and § 9-2-332 does not apply. In the alternative, they urge that no matter how the cause of action is identified, the filing of their claim was, in fact, timely.

We have specifically addressed this issue in Utah Construction Co. v. State Highway Commission, 45 Wyo. 403, 19 P.2d 951 (1933). In Utah Construction, supra, the contractor was seeking increased payment under the contract, with the only form of claim being submitted being a letter from the contractor to the State Auditor as required by the statute. We held that even though the statute authorizes suits against the Highway Commission on the contract, this does not relieve the claimant of the obligation to comply with the claim statute. We said:

> " . . . The statute giving the right to sue the state highway commission on its contracts cannot be given a meaning that would permit on invasion of the mandatory constitutional provision (article 16, § 7) that prohibits the audit, allowance, or payment of a claim until it has been filed with the auditing officer. The statute authorizing suit does not purport to repeal or modify section 109-305, supra, requiring claims to be exhibited to the auditor within one year after they accrue 'and not afterward.' . . . " 19 P.2d, at 953. 2/

Article 16, Section 7, provides:

"No money shall be paid out of the state treasurey except

We concluded in Utah Construction, supra, 19 P.2d, at 955, by saying:

> "We are of opinion, therefore, that the filing of the plaintiff's claim with the auditing officer was a condition precedent that could not be waived, and, as the petition does not show that the condition had been performed, the demurrer was properly sustained."

See, also, Price v. State Highway Commission, 62 Wyo. 167 P.2d 309, 312, where the condition-precedent rule was adopted in a negligence action. We reaffirmed the rule of Utah Construction, supra, and Price, supra, when we said, in Awe v. University of Wyoming, 534 P.2d 97, 102:

> "In the face of well-established law in Wyoming that the filing of such a claim under § 9-71 is a condition precedent to suit, we are hesitant to reverse the holdings of Utah Construction, supra, and Price, supra. We recognize that the requirement as interpreted by those cases was judicially created because no statute specifies that the claim is a condition precedent to suit, but we re-affirm their holdings . . . . "

Under the authorities above cited, the filing of a claim as provided by statute would have been a condition precedent to the prosecution of the litigation if the action had been on the contract—or in tort.

Inverse condemnation and the claim-filing statute:

(a) Are consequential damages compensable?

---

upon appropriation by law and on warrant drawn by the proper officer, and no bills, claims, accounts or demands against the state, or any county or political sub-division, shall be audited, allowed or paid until a full itemized statement in writing, certified to under penalty of perjury, shall be filed with the officer or offices whose duty it may be to audit the same."

The Napolitanos urge that the damages claimed are consequential to their remaining property rights and emanate from the failure of the Highway Department to perform according to its representations with reference to the highway elevation. They say that the business would not have been injured had promises been kept, but, because they weren't, the business has suffered and that this consequential damage came about through a taking for which they have a right to be compensated.

Article 1, Section 33, of the Wyoming Constitution provides:

> "Private property shall not be taken or damaged for public or private use without just compensation."

Plaintiffs argue that this constitutional provision is self-executing and that the legislature cannot enact statutes which deprive persons of property rights guaranteed thereby. The argument goes on to make the point that, to the extent the claimfiling statute § 9-2-332, W. S. 1977, does this, it is unconstitutional.

The court found that Plaintiffs did suffer compensable damages of the nature claimed. *We hold that such damages are compensable under the guarantee of Article 1, Section 33,* supra.

The rule is said to be:

> "Under the constitutional provision which requires payment of compensation when property is damaged, consequential damages may be recovered . . . Under this provision property is damaged when it is made less valuable, less useful, or less desirable. (The measure of damages in such case is the difference between the fair market value before and after the inflicting of the damage.) Hence, it is immaterial whether such damage occurs by reason of the construction or the maintenance of the project, so long as it is directly attributable to such causative factor, and

irrespective of whether there has been an actual physical taking of any part of such property. The depreciation in value, however, must be by reason of damage to the land itself or to property rights therein. Personal inconvenience or discomfort to the owner, or interference with the business conducted on the land, is not compensable *unless such results are causative factors in the depreciation in the value of the land . . . .*" 4A Nichols on Eminent Domain, Sec. 14.1 (1), pp. 14-19, et seq. (Emphasis supplied)

Support for Napolitanos' position is found in Hirt v. City of Casper, 56 Wyo. 57, 103 P.2d 394 (1940). This case concerned a challenge of a jury's award of damages in a condemnation proceeding. The issue was whether the appellants, who owned property abutting on a local street, could recover damages for interference with their right of ingress and egress as a result of the street construction. The claimant's property was not physically taken. We interpreted Article 1, Section 33, of the Wyoming Constitution as protecting plaintiff's easement to the street when we said:

" . . . The term 'damaged' used in the constitution, and the term 'injuriously affected' used in the various sections of the statute, are synonymous. Rigney v. Chicago, 102 Ill. 64; Gottschalk v. Chicago, B. & Q. R. Co., 14 Neb. 550, 16 N.W. 475, 17 N. W. 120. In other words, the statutes of this state recognized the fact, prior to the adoption of the constitution, that in a proceeding of eminent domain compensation should be made not only for property actually and physically taken, but also for damages which would be sustained by reason of the exercise of the power. The constitution merely confirmed a rule which had already previously been adopted by the legislature . . . .

" . . . (W) e find that to interfere with an easement, such as is involved in the case at bar, is, in essence, an injury or damage, to the property

owned by the abutting property owner, and that, in turn, in essence, is a taking in the broad sense of that term, which must be compensated for under our constitution, unless countervailing reasons to the contrary exist . . . . " 103 P2d, at 398-399.

We upheld a verdict for consequential damages in State Highway Commission v. Peters, Wyo., 416 P.2d. 390. The reason such damages were denied in Sheridan Drive-In Theatre, Inc. v. State, Wyo., 384 P.2d 597, was because there was no proof that the highway relocation damaged the remaining property of the plaintiff. We did not, in that case, reject the concept.

In sum, we agree with the Plaintiffs that such consequential damages to the remaining property as are complained of here are compensable under the protection afforded by Article 1, Section 33, of the Wyoming State Constitution.

(b) The statutory claim must be filed in an inverse condemnation proceeding.

As we have said, the Plaintiffs urge that, if the filing was not timely under § 9-2-332, W. S. 1977, this ommission is not fatal because Article 1, Section 33, is self-executing. Article 16, Section 7, of the Wyoming Constitution commands the filing of claims with the officer or offices whose duty it may be to audit the same before money can be paid out of the State Treasury, and this section of our constitution is of equal dignity with Article 1, Section 33, which prohibits the taking or damaging of property without just compensation. In fact, the two provisions are not in conflict. The rights afforded by Article 1, Section 33, are protected even though the directive of Article 16, Section 7, are complied with, since Article 16, Section 7, is no more than a regulation of the procedure by which the rights guaranteed by Article 1, Section 33, will be exercised. It is not a substantive limitation imposed upon such rights.

The Napolitanos rely upon the authority expressed

by those courts which have found that state statutes requiring a timely filing of claims with a particular state official are not a condition precedent to suits against the state in inverse condemnation. This is an extension of the philosophy that such constitutional provisions as those found in Article 1, Section 33, are self-executing. Generally, the states which have come to this conclusion have done so upon the theory that the constitutional rights to just compensation is beyond legislative destruction. The theory behind the argument is that constitutional provisions which assure citizens their right to recover from the state for property taken are limitations on the state government's power and, therefore, the state cannot restrict a limitation which has been placed upon it. Alexander v. State, 142 Mont. 93, 381 P2d 780; State ex rel. Herman v. Mestas, 12 Ariz. App. 289, 469 P.2d 855; Armbruster v. Stanton-Pilger Drainage District, 165 Nb. 459, 86 N. W. 2d 56; Boitano v. Snohomish, 11 Wash. 2d 664, 120e P. 2d 490; and Decker v. State, 188 Wash. 222, 62 P.2d 35.

States which have held that claim-filing statutes *are* capable of limiting the time in which one must seek just compensation in inverse condemnation cases approach the problem from the standpoint of the reasonableness of the limitation. California, in City of San Jose v. Superior Court of Santa Clara 9/6/74, County, 12 Cal. 3d 447, 115 Cal.Rptr. 797, 525 P.2d 701, specifically has held that their claim statute applies to cases of inverse condemnation.

In City of San Jose, supra, the California Supreme Court said:

> "The claims statutes provisions apply to actions brought both for nuisance and for inverse condemnation. (Bellman v. County of Contra Costa (1960), 54 Cal.2d 363, 369, 5 Cal.Rptr. 692, 353 P.2d 300; Dorrow v. Santa Clara County Flood Control Dist. (1970), 4 Cal.App.3d 389, 391, 84 Cal.Rptr. 518; Mosesian v. County of Fresno

> (1972), 28 Cal.App.3d 493, 495, 104 Cal.Rptr 655.) The fact that inverse condemnation is founded directly on the California Constitution (art. 1, § 14) neither excuses plaintiffs from compliance with the claims statutes (Powers Farms v. Consolidated Irr. Dist. (1941), 19 Cal.2d 123, 126, 119 P2d. 717; Dorrow v. Santa Clara Flood Control Dist., supra, 4 Cal.App.3d 389, 391-392, 84 Cal. Rptr. 518), nor renders the claims statutes unconstitutional. (Crescent Wharf etc. Co. v. Los Angeles (1929), 207 Cal. 430, 278 P. 1028; Dorrow v. Santa Clara County Flood Control Dist., supra, 4 Cal.App.3d 389, 391-392, 84 Cal.Rptr. 518.)" 525 P.2d, at 706.

We discussed the problem at hand in North Laramie Land Co. v. Hoffman, 30 Wyo. 238, 219 P. 561, 572, aff'd 45 S.Ct. 491, 268 U.S. 276, 69 L.Ed. 953. In this case, a landowner-plaintiff sought a restraining order against the county's taking a part of his land for road purposes. The statute provided for objections or claims for damages to be filed within a time period to be established by a board. In compliance, a date was set and notice given that all objections or claims for damages had to be filed by June 7, 1917. Plaintiff, however, filed objections and his claim for damages on June 30, 1917. Several days later, the county commissioners executed and filed a document which purported to be an extension of the time for filing such objections. Since the statute providing for the filing of objections did not include the authority for the Board of County Commissioners to extend the time period after it was initially set, the objection was held to be untimely.

Plaintiff argued that the statute could not

> "impose upon an owner whose property is sought to be taken in eminent domain proceedings a condition that, in order to be entitled to compensation, he must file a claim therefore."

Cited in support of this contention were cases from

Washington and Nebraska, the Supreme Court of Nebraska having held that claim statutes do not affect inverse condemnation actions. We noted that the Nebraska case argued by the plaitiff dealt with a constitutional provision identical to that of Wyoming on eminent domain, but these cases did not persuade us that this should be the law of this state. We concluded that as long as the damages are payable absolutely in highway proceedings, ample provision exists under our laws for ultimate payment. We found this sufficient to satisfy the requirements of the constitution. *The opinion contemplates that the entity in charge of the highway construction is entitled to know the claims made and objections entered at a time which would then enable that entity to determine whether or not to place the burden of the expense of construction upon the taxpayers.* The court did

> "not feel justified in holding a law requiring the presentment of a claim for damages within a given time as unconstitutional when, . . . reasonble provision has been made and reasonable opportunity has been given, after notice, for the landowner to do so . . . ."

In so holding, we cited the following authority: Wabash, etc., R. Co. v. Defiance, 52 Ohio St. 262, 305, 40 N. E. 89, and other Ohio cases cited; Brookville, etc., Co. v. Butler, 91 Ind. 134, 46 Am. St Rep. 580; Kansas City v. Duncan, 135 Mo. 571, 37 S.W. 513; Petet v. McClanahan (Mo.) 249 S.W. 918; Sala v. Pasadena, 162 Cal. 714, 124 Pac. 539; Potter v. Ames, 43 Cal. 75; Taylor v. Drainage District, 167 Iowa 42, 148 N.W. 1040, L.R.A. 1916B, 1193; State v. Messenger, 27 Minn. 119, 6 N.W. 457; Simms v. R. R. Co., 59 Tenn. 621; Bost v. Cabarrus County, 152 N.C. 531, 67 S.E. 1066; Wabash, etc., R. Co. v. Defiance, 167 U.S. 88, 17 Sup. Ct. 748, 754, 42 L.Ed. 87; 20 C. J. 871, 872; and Nichols, Eminent Domain, § 344.

Having in mind the North Laramie Land Company case, and other authority which stands for the reason-

ableness of § 9-2-332, when tested against Article 1, Section 33, we are compelled to the conclusion that § 9-2-332 applies to inverse condemnation claims — and so hold.

(C) The claim was not timely filed.

The court permitted the Plaintiffs to amend their complaint to show a filing of their claim with the State Auditor on December 29, 1975. On October 16, 1974, the relocated highway was open for traffic. Assuming, arguendo, that the Plaintiffs were not chargeable with the notice which they must have had when they were complaining to the Highway Department and contractor personnel in August, 1973 and the Spring of 1974, it can hardly be contended that they did not have actual notice of the taking of which they complained, as evidenced by the permanent position, grade and elevations of the relocated highway, when it was released for use by traffic on October 16, 1974. More than fourteen months elapsed between this event and the 29th of December, when the claim was filed with the State Auditor. The statute requires the filing of the claim with the Auditor within one year after

> "such claim shall accrue . . . ."

When, then, does the claim accrue?

Several decisions rendered by California courts have concerned themselves with this issue. Two such cases are Robinson v. Southern California Ry. Co., 129 Cal. 8, 61 P. 947; and Williams v. Southern Pacific R. Co., 150 Cal. 624, 89 P. 599. Robinson was an action to recover damages for taking a 100-foot-wide strip of land, and constructing thereon a railroad track. In deciding the date the cause of action commenced, the court said:

> " . . . The complaint alleges an unlawful taking of possession in May, 1887. *The damages alleged accrued at least as soon as the road was built and operated, which was in 1889.* The complaint was

filed August 11, 1899, and we think the action was barred . . . " (Emphasis supplied) 61 P., at 948.

Williams, supra, also concerned an unlawful entry upon land for the purpose of constructing a railroad track without having first obtained the consent of the plaintiff-landowner. The California Supreme Court stated the following, at 89 P. 599:

" . . . The appellant seeks to avoid the bar of the statute by the contention that, since the injury complained of . . . was in its nature continuing, a new cause of action arose at each moment of its continuance, and that successive actions might be brought, in each of which the plaintiff might recover damages accruing up to the time of the commencement of the action. This rule is properly applicable in cases where the injury or tresspass is temporary in character, . . . On the other hand, where the injury or trespass is of a permanent nature, all damages, past and prospective, are recoverable in one action, and the entire *cause of action accrues when the injury is inflicted or the trespass committed* . . . " (Emphasis supplied)

The Robinson and Williams decisions, supra, were cited in Pierpont Inn, Inc. v. State, 70 Cal.2d 282, 74 Cal.Rptr. 521, 449 P. 2d 737, in which the California Supreme Court ruled that the claim period provided for in section 644 of the Government Code began to run from *the date of completion* of a freeway project.

In Mosesian v. County of Fresno, 28 Cal.App.3d 493, 104 Cal.Rptr. 655, the plaintiffs contended that their claim for damages in inverse condemnation did not accrue until they had substantive knowledge that a pond constructed on their land was a permanent improvement. The court rejected this argument when it said.

"The amorphous concept of when a cause of action arises in an inverse condemnation claim has been treated in a number of cases. Notwithstanding some inconsistencies in the language of the cases,

each makes clear that the time is not limitless. Non supports Mosesians' contention that though a taking is objectively total and the improvement complete, the time for filing a claim is postponed until the claimant is subjectively convinced the taking is permanent rather than temporary . . . "

The court also noted that even accepting the plaintiffs' contention, the claim did not accrue until they had subjective knowledge of the permanence of the pond, and, therefore, the claim was still barred. The court ruled that the plaintiffs had such subjective knowledge in 1969, when they first made a written demand upon the county. The court said:

" . . . As their knowledge of the permanence of the taking was in excess of one year prior to filing of the claim in February 1970, plaintiffs' claim is barred by the claims statute even if it be assumed the law permits postponement until the claimant subjectively knows the taking is permanent." 104 Cal.Rptr., at 662.

Cheskov v. Port of Seattle, 55 Wash.2d 416, 348 P.2d 673, was an inverse condemnation action brought by landowners who resided adjacent to Seattle International Airport seeking to recover compensation for the reduction of market value caused by noise, dust, and vibration of aircraft operations. The airport was established in 1951 and over the years until the commencement of the action, traffic gradually increased. The Washington Supreme Court held that action was barred by a three-year limitations period. In regard to the time when the plaintiffs' claim accrued, the court said:

"The theory of damages is that, where a use which causes damage to adjacent property is permanent in nature, its effect upon the market value of that property is also permanent and is ascertainable at the time it becomes known that the use will continue. What effect the presence of a large commercial airport adjacent to the

plaintiff's property had upon the market value of that property at the time it was established and the character and extent of its probable operations became known, is simply a question of fact. This, it is not denied, was prior to 1951. There is nothing in the findings suggesting that the disturbances causing the damage have become different in kind or substantially greater in degree, or greater than could reasonably have been anticipated when the airport was established. In other words, the cause of action which the plaintiffs now have, so far as the findings reveal, is the same as the cause they had when the airport was established, and if the evidence failed to show the full amount of damage at the time of the accrual of that cause of action, that is a deficiency in the evidence and not a defect in the rule of damages . . . where a corporation vested with the power of eminent domain takes possession of private property (or, by the same token, damages it) in advance of eminent domain proceedings, it cannot insist that the compensation awarded be fixed as of the date of the unlawful entry. See 4 Nichols Eminent Domain (3rd Ed.) 47, § 12.23 (3). In a proper case it might well be found that damages should be determined as of a later date, but that does not affect the date of accrual of the cause of action." 348 P.2d, at 676.

The above-discussed cases, while occasionally mentioning "acceptance," primarily emphasized the date of completion. They speak in terms of "when the taking is apparent or discoverable," or "when there is substantial interference resulting in a decline in market value." The courts appear to reject the substantive-knowledge (of the plaintiff) test in favor of a more objective test such as the date of completion. This indicates a time when the plaintiff knows or should have known that the taking and damage is complete. The completion of the highway and resultant re-routing of traffic (October, 1974) provide such an objective date.

The Plaintiffs herein were, or should have been aware of the damage and its permanence at this time. Nothing of significance occurred – with respect to damages – between that date and the time when the highway was formally accepted. The Plaintiffs themselves used October, 1974, as the valuation date for damages. A road completion date, which involves a re-routing of traffic, does not give rise to speculation as to Plaintiffs' awareness of damages, as would be the case with the earlier dates (August, 1973, and Spring, 1974), when Plaintiffs expressed their initial complaints.

The plaintiffs knew that the taking for which they seek damages was complete when traffic was re-routed on October 16, 1974. The fact is – they surely knew of the taking when they complained to the contractor's employee and the Highway Department's employee in August of 1973 and the Spring of 1974. But, even though this may be subject to argument and explanation, there can be no question but that they had knowledge of the permanent taking, with its attendant damage, when the traffic was re-routed on October 16, 1974.

It was then their duty to file a claim within a year of that date as provided by statute. This was not done and, therefore, the motion for summary judgment should have been sustained.

Reversed.

IN THE SUPREME COURT,
STATE OF WYOMING

WYOMING STATE HIGHWAY DEPARTMENT and STATE HIGHWAY COMMISSION,	)	
Appellants (Defendants below),	)	No. 4727
vs.	)	PETITION FOR REHEARING
FRANK D. NAPOLITANO and NORMA NAPOLITANO,	)	
Appellees (Plaintiffs below).	)	
FRANK D. NAPOLITANO and NORMA NAPOLITANO,	)	
Appellants (Plaintiffs below).	)	
vs.	)	No. 4728
WYOMING STATE HIGHWAY DEPARTMENT and STATE HIGHWAY COMMISSION,	)	
Appellees (Defendants below).	)	

Plaintiffs below do now respectfully petition the court for rehearing upon the following grounds:

1— The Court's interpretation of the claim filing statute, Section 9-2-332, W.S., 1977, makes the Statute as applied in this case repugnant to the Fifth and Fourteenth Amendments to the Constitution of the United States in that it has abridged or destroyed the rights of the plaintiffs to obtain just compensation for

property rights taken from them by State authorities for public use.

2— The authorities upon which the Court relies for its decision that the claim filing statute bars the right of action have been significantly eroded and do not constitute the current law in the State of California upon the question.

A brief in support of the petition for rehearing is submitted herewith.

Should the Court disagree with the contentions herein expressed by plaintiffs below and in their accompanying brief on the federal Constitutional question, we respectfully urge that the Court's conclusion thereon be set forth in an additional opinion so that there may be no doubt that the plaintiffs below have exhausted their possible remedies in the Wyoming courts.

Respectfully submitted,

BANGS, McCULLEN, BUTLER, FOYE & SIMMONS

By /s/

George A. Bangs
Attorneys for Frank D. and Norma Napolitano
818 St. Joe Street
Post Office Box 2670
Rapid City, SD 57709

/s/

Edward S. Halsey
Attorney for Frank D. and Norma Napolitano
Post Office Box 427
Newcastle, Wyoming 82701

IN THE SUPREME COURT,
STATE OF WYOMING

APRIL TERM, A. D. 1978

WYOMING STATE HIGHWAY DEPARTMENT and STATE HIGHWAY COMMISSION, Appellants (Defendants below).	)	
v.	)	No. 4727
FRANK D. NAPOLITANO and NORMA NAPOLITANO, Appellees (Plaintiffs below).	)	
FRANK D. NAPOLITANO and NORMA NAPOLITANO, Appellants (Plaintiffs below).	)	
v.	)	No. 4728
WYOMING STATE HIGHWAY DEPARTMENT and STATE HIGHWAY COMMISSION, Appellees (Defendants below).	)	

ORDER

Frank D. Napolitano and Norma Napolitano have filed a petition for rehearing in the above appeals. Having considered the petition, as well as the opinion handed down herein on May 4, 1978, we find that all points raised in the petition were carefully and fully considered by the court in the disposition heretofore made.

IT IS, THEREFORE, ORDERED that the petition for rehearing be, and the same is hereby, denied.

Dated at Cheyenne, Wyoming, this 20th day of June, 1978.

BY THE COURT:

RODNEY M. GUTHRIE,
CHIEF JUSTICE

MANDATE ON REVERSAL OR MODIFICATION

In the Supreme Court of The State of Wyoming

Entered In Journal 18
Page 38
Date: July 13, 1978

To the Honorable the District Court of the County of Weston, Greeting:

Whereas, Wyoming State Highway Department and State Highway Commission and Frank D. Napolitano and Norma Napolitano on the 20th day of September, A.D. 1976, filed a record on appeal in the Supreme Court of the State of Wyoming to obtain the reversal of a judgment rendered by you on the 8th day of July, A.D. 1976, in a cause pending before you wherin Frank D. Napolitano and Norma Napolitano were plaintiffs and the Wyoming State Highway Department anl State Highway Commission were defendants; and

Whereas, The following proceedings were had and entered in the Supreme Court in said cause on the 4th day of May, A.D. 1978, to-wit:

"These causes having been heretofore taken under advisement, the court, being now fully apprised in the matter, does say and find there is error in the record of the proceedings of the District Court of Weston County.

"It is therefore ordered and adjudged for the reasons stated in the opinion herein this day delivered and filed that the judgment of the district court be, and the same is hereby, reversed.

"It is further ordered that the costs of these appeals be taxed against the Napolitanos, appellees in Case No. 4727 and the appellants in Case No. 4728."

COSTS IN THE SUPREME COURT:

Docket fee, Case No. 4727: $15.00;

Brief of appellants, Case No. 4727: $47.25;

Brief of appellees, Case No. 4728: $14.25;

Transcript: $582.00.

Now, Therefore, *You are commanded without delay to carry into execution and effect the within and foregoing judgment of our said Supreme Court.*

Witness, *The Honorable Rodney M. Guthrie, Chief Justice of said Supreme Court, and the Seal thereof, at Cheyenne, this 11th day of July, A.D. 1978.*

(Seal)

Clerk.

Supreme Court, U. S.
FILED
OCT 18 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1978

No. 78-465

FRANK D. NAPOLITANO and
NORMA NAPOLITANO, Appellants,

vs.

WYOMING STATE HIGHWAY DEPARTMENT
AND STATE HIGHWAY COMMISSION,
Appellees

MOTION TO DISMISS

JOHN J. ROONEY
Attorney General
State of Wyoming
123 Capitol Building
Cheyenne, Wyoming 82002

GLENN A. WILLIAMS
Senior Assistant Attorney General
State of Wyoming
123 Capitol Building
Cheyenne, Wyoming 82002

Attorneys for Appellees

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MISCELLANEOUS:

Title 28, U.S. Code, Section 1257 (2) .....

Wright & Miller, Federal Practice and Procedure, Civil Section 2716, pp. 435-436, Volume 10 .....

Annotations, 49 L. Ed. 414, 67 L. Ed. 557, 79 L. Ed. 1539 .....

In the Supreme Court of the United States

October Term, 1978

No. 78-465

FRANK D. NAPOLITANO and
NORMA NAPOLITANO, Appellants,

vs.

WYOMING STATE HIGHWAY DEPARTMENT
AND STATE HIGHWAY COMMISSION,
Appelees

MOTION TO DISMISS

The Appellees move the Court to dismiss the appeal herein on the grounds that it does not represent a substantial federal question and that the federal question sought to be reviewed was not timely or properly raised, or expressly passed on.

I

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

This appeal raises the question of the validity of Section 9-2-332, Wyoming Statute, 1977.

> This statute states:"Persons having claims against the state shall exhibit the same, with the evidence in support thereof, to the auditor, to be audited, settled and allowed, within one year after such claim shall accrue, and not afterward."

B. The Proceedings Below

Appellants and Appellees entered into an agreement for

the purchase of certain land for highway right of way. By mutual agreement the purchase price and attending construction conditions were agreed upon by the parties. During the course of construction Appellants contended that the highway was being constructed contrary to their agreement and understanding. When Appellees refused to pay damages or make construction changes, Appellants brought an inverse condemnation action. Appellees defended, among other defenses, the application of Section 9-2-332, Wyoming Statutes, 1977, which, in effect, required the submissions of claims to the state auditor within one year after a claim accrued. The lower court held that such a claim was filed in time and subsequently awaded Appellants damages. Appellees appealed to the Wyoming Supreme Court on the grounds that the lower court committed error in finding a claim had been filed within one year's time with the auditor. The Wyoming Supreme Court reversed the lower court. On motion for rehearing, appellants for the first time raised the applicability of the Fifth and Fourteenth Amendment to the United States Constitution. The motion was denied by the Wyoming Supreme Court and Appellants filed their direct appeal to this court under the provisions of Title 28, U.S. Code, Section 1257(2).

II

ARGUMENT

Inasmuch as the federal question sought to be reviewed herein was not timely or properly raised in the state courts, there is no federal question for this court to consider. In *Cardinale v. Louisiana*, 394 U.S. 437, 22 L. Ed. 2d 398, 89 S. Ct. 1162 this court said:

> "Although certiorari was granted to consider this question, the fact emerged in oral argument that the sole federal question argued here had never been raised, preserved, or used upon in the state courts below. It was very early esablished that the Court will not decide federal constitutional issues raised here or the first time on review of state court decisions. In Crowell v. Randell, 10 Pet 368, 9 L Ed 458 (1836), Justice Story reviewed the earlier cases commencing with Owings v Norwood's Lessee, 5 Cranch 344, 3 L Ed 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c 20, Sec. 25, 1 Stat 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet 368, 391 L Ed 458, 467. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the Crowell opinion, Miller v Nicholls, 4 Wheat 311, 315, 4 L Ed 578, 579 (1819), and since, e.g. Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., Inc., 360 US 334, 342, n. 7, 3 L Ed 2d 1280, 1286, 79 S Ct 1196 (1959); State Farm Mutual Automobile Ins. Co. v. Duel, 324 US 154, 160-163, 89 L Ed 812, 817-819, 65 S Ct 573 (1945); McGoldrick v. Compagnie Generale Transatlantique, 309 US 430, 434-435, 84 L Ed 849, 851-852, 60 S Ct 670 (1940); Whitney v. California, 274 US 357, 362-363, 71 L Ed 1095, 1100, 1101, 47 S Ct 641 (1927); Dewey v Des Moines, 173 US 193. 197-201, 43 L Ed 665, 667-668, 19 S Ct 379 (1899); Murdock v City of Memphis, 20 Wall 590, 22 L Ed 429 (1875).
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> 'In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 USC Sec. 1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, O'Connor v Ohio, 385 US 92, 17 L Ed 2d 189, 87 S Ct 252 (1966), they should be given the first opportunity to consider them.
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> "In view of the petitioner's admitted failure to raise the issue he presents here in any way below, the failure of the state court to pass on this issue, the desirability of giving the state the first opportunity to apply its statute on an adequate record, and the fact that a federal habeas remedy may remain if no state procedure for raising the issue is available to petitioner, the writ is dismissed for

want of jurisdiction."

See also *Tacon v. Arizona*, 410 U.S. 351 (1973); Annotations found in 49 L. Ed. 414, 67 L. Ed 557, 79 L. Ed. 1539. Cases are legion that state this principle. One case representative of this principle is *Mellon v.O'Neil*, 275 U.S. 213, 72 L. Ed. 245 (1927) wherein the court said:

> "It has long been settled that this court acquires no jurisdiction to review the judgment of a state court of last resort on writ of error, unless it affirmatively appears upon the face of the record that a federal question consitituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court. Whitney v. California, 274 U.S. 357, 360, 71 L. ed. 1095, 1099, 46 Sup. Ct. Rep. 641; [215] and cases cited It is not enough that there may be somehwere hidden in the record a question which if it had been raised would have been of federal nature. Dewey v. Des Moines, 173 U.S. 193, 199, 43 L. ed. 665, 666, 19 Sup. Ct. Rep. 379; Keokuk & H. Bridge Co. v. Illinois, 175 U.S. 626, 634, 44 L. ed. 299, 302, 20 Sup. Ct. Rep. 205; Whitney v. California, supra, 362.

Appellants nowhere in their brief point out where they raise such federal question properly or timely in the state lower or appellate courts. The only reference to the question was made in their Motion for Rehearing. Appellant's Appendix, p. 22a. The court's order denying the motion in no way touched the federal question. Appellant's Appendix, p. 25a.

"The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides." *Herndon v. Georgia*, 295 U.S. 443 (1935). *Chicago, Indianapolis, & Louisville Railway Company v. McGuire, et al*, and annotation thereto. 196 U.S. 128 (1905).

In the State of Wyoming a party is bound by the allegations of his petition, *Pardee v. Kuster*, 91 P. 836, 15 Wyo. 368, and is bound by his theory of the cause in its logical sequence. *State v. Schnitzer*, 95 P. 698, 16 Wyo. 479 (1908). Generally questions not going to the jurisdiction of the trial court and not raised in the trial court will not be considered on appeal. *Neu v. Grant*, 548 F. 2d 281 (1977), 10 Wright &

Miller, Federal Practice and Procedre, Civil Section 2716, pp. 435-436; nor can a party advance new theories or issues in order to secure a reversal, and theories or issues which are not apparent or reasonably discernible from the pleadings, affadavit and exhibits, not being considered by the courrt. *Minnehoma Financial Co. v. Pauli*, 565 P. 2d 835 (Wyo. 1977), *Laramie Printing Trustees v. Krueger*, 437P. 2d 856 1968).

I

CONCLUSION

We respectfully submit, therefore, that the Appellants present no substantial question for the decision of the Court, and that the judgment and decree of the Supreme Court of Wyoming should be affirmed.

RESPECTFULLY SUBMITTED,

October, 1978